

**UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA**

In re BAYCOL PRODUCTS LITIGATION	:	MDL No. 1431
	:	(MJD/SRN)
This Document Relates to:	:	
	:	
<i>Dinora Adan, et al. v. Bayer Corp., et al.</i>	:	Case No. 05-0198
	:	

**DEFENDANTS BAYER CORPORATION AND BAYER AG'S
MEMORANDUM IN SUPPORT OF MOTION TO DISMISS**

On July 7, 2005, the Court dismissed the claims of seven plaintiffs in this action without prejudice, including those of Jose Martinez. *See* Stipulation and Order of Voluntary Dismissal Without Prejudice (Ex. A) at 1. Because Mr. Martinez's claims have been dismissed, so too should the claims of his spouse, plaintiff Ena Martinez.

Mrs. Martinez's claims are entirely derivative of the claims of her husband, seeking relief for loss of consortium. *See* Compl. (Ex. B) at ¶¶ 132-136. Derivative claims cannot survive the dismissal of the principal claims. *See, e.g., Dillard v. Torgerson Properties, Inc.*, 2006 WL 2974302 (D. Minn. Oct. 16, 2006) (dismissing derivative loss of consortium claim because underlying tort claims failed); *Rosenthal v. Rodriguez*, 750 So.2d 703, 704 (Fla. Ct. App. 2000) (derivative loss of consortium claim rests on viability of principal tort claim).¹ Indeed, since the dismissal of her husband's claims, Mrs. Martinez has not prosecuted her action. Accordingly, Mrs. Martinez's claim for loss of consortium should be dismissed.

¹ Plaintiff Ena Martinez and her spouse, Jose Martinez, reside in the State of Florida. *See* Compl. (Ex. B) at ¶ 1.

For the foregoing reasons, Bayer Corporation and Bayer AG respectfully request that the Court enter an Order dismissing the claims of plaintiff Ena Martinez should be dismissed without prejudice pursuant to Fed. R. Civ. P. 41(b).

Dated: September 21, 2009

Respectfully submitted,

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